

## BOOK REVIEWS

### FLORIS DE WITTE, JUSTICE IN THE EU. THE EMERGENCE OF TRANSNATIONAL SOLIDARITY (OUP 2015)

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In the famous words of Robert Schuman, Europe is not built at once or as a single whole, but on the basis of concrete achievements, creating first a solidarity of fact.<sup>1</sup> Even if in the original Treaties the word 'solidarity' only occurred as an echo of the Schuman declaration, in recent years it has made a number of appearances in key constitutional documents of the EU. Art. 2 of the Treaty of European Union (hereafter TEU) lists solidarity as one of the prevailing values of the EU and Art. 3 TEU illustrates that the Union shall promote solidarity in three different ways: as solidarity between generations, as solidarity among Member States, and as solidarity and mutual respect among peoples. Even the Charter of Fundamental Rights, the main human rights instrument of the EU, lists solidarity among its foundations and dedicates its Title IV to this principle.

EU law might not be agnostic to the concept of solidarity, nevertheless its practical implementation and Member States' motivations behind the concept still remain controversial. The academic debate on solidarity within the EU raises a number of salient questions. How is the notion of solidarity understood in the framework of the EU? What are the legal, political, economic, and moral limits of European solidarity? Floris de Witte's book 'Justice in the EU. The Emergence of Transnational Solidarity' tackles these difficult questions from an innovative perspective. Instead of focussing on solidarity between Member States, the book explores the way in which European integration and EU law reshape the relationship between citizens. By understanding justice as a relational commitment between citizens that

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<sup>1</sup> *'L'Europe ne se fait pas d'un coup ni dans une construction d'ensemble, mais par des réalisations concrètes créant d'abord une solidarité de fait.'*

stand in a particular relationship to each other, de Witte interestingly introduces interpersonal claims of solidarity based on relational interactions as a useful method for capturing cosmopolitan dynamics within the structures of the nation state. This review analyses and critically assesses the main arguments put forward by de Witte, as they appear in the five chapters of the book.

The first Chapter of the book introduces ways of thinking about social justice beyond the nation state. De Witte understands social justice as the availability of welfare entitlements and choices enabling individuals to live a 'good life', meaning an autonomous and dignified life, in which each citizen can choose how to structure their priorities. This understanding of social justice presupposes significant and long-term processes of social and institutional structuring, such as an active civil society, public sphere, and avenues for participation and mediation of differentiated interests. Besides institutions, the pursuit of social justice needs moral sources captured under the term 'solidarity' in so far as they create a motive for individuals to share their resources with others in the same community. These preconditions for the achievement of social justice explain why the pursuit of justice has historically been tied to the spatial context of the nation state.

Nevertheless, de Witte notes that the globalization of economic processes and the integration through law in the EU progressively lift boundaries in economic and social terms and thus dislocate the question of social justice from the institutional structure of the nation state. The emergence of mobile actors, who dispose of the legal right and the economic capacity to exit a certain polity, significantly decreases the capacity of the nation state to lock in actors and to extract from them resources needed for redistributive programmes. This gradual dissolution of the social question away from the nation state has sparked diverse concerns and opinions among scholars. De Witte identifies four normative claims that animate the current academic debate about social justice. For adherents of the neo-liberal project, the dissolution of the social question is to be applauded, since it protects individual freedom against state intervention. Others, such as Polanyi and

Streeck,<sup>2</sup> see the separation between the social question and the transnational economy as problematic, because it deprives citizens of their political agency over the conditions of life, while cosmopolitans see it as a positive step towards a new, cosmopolitan type of society. Finally, scholars such as Habermas<sup>3</sup> understand the inability of the nation state to engage with transnational dynamics as an opportunity to start building political structures beyond the nation state.

De Witte provides a very balanced presentation of the four normative claims, although he does not engage in a detailed discussion about the political background or implications of each claim presented. In this way, he misses the opportunity to underline how the political and ideological identity of a state influences the model of social policy it adopts. Moreover, de Witte's own views on the preferred justice paradigm remain deeply submerged, even if the reader might have suspicions about where his sympathies lie. The fact that he does not clearly articulate which of the four different paradigms he endorses, affects the coherence of the arguments presented in the book, since the types of EU solidarity presented in the following chapters are not (anymore) assessed under the lens of the normative claims introduced in the beginning of the book. This creates the misleading impression that there is no link between the justice paradigm adopted by the EU and the redistributive outcomes of the types of solidarity that the EU applies in practice.

In any case, as de Witte remarks, any modern conception of justice cannot function relying exclusively on processes within or beyond the nation state. But then the difficult question arises, how can we strengthen the nation state's capacity for redistribution, while promoting the capacity of actors to move between states and thereby overcome the moral arbitrariness of boundaries? De Witte's book focuses specifically on the conceptualisation of a new mode of social integration, which would serve to realise a type of social justice that reconciles this tension. He suggests the concept of reciprocity, understood in economic, social or political terms, as a starting point for

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<sup>2</sup> See W. Streeck, 'Taking Capitalism Seriously: Towards an Institutional Approach to Contemporary Political Economy' [2011] 9 Socioeconomic Review 158; K. Polanyi, *The Great Transformation* (Beacon 2002).

<sup>3</sup> See J. Habermas, *The Crisis of the European Union* (Polity 2012).

reintegrating cosmopolitan dynamics within the structure of the nation state in the pursuit of social justice. Unlike other authors, who understand reciprocity as obligations between states,<sup>4</sup> de Witte articulates a concept of solidarity based on the associative and relational interactions between citizens. He very interestingly introduces interpersonal claims of solidarity based on relational dynamics as a useful method for the reconfiguration of justice on national level so as to take account of transnational relational commitments.

This is followed in Chapter 2 by an analysis of the interaction between national conceptions of justice, which are primarily expressed through institutions of the welfare state and the process of European integration. Even though the Union's legislative competences in the social area have gradually increased over time, social policy still remains the 'stepchild' of European integration. De Witte claims that the refusal of Member States to transfer welfare competences to the Union goes back to the absence on the European level of two essential institutional preconditions: a functioning system of representative democracy and the capacity to generate a feeling of solidarity between citizens. Quoting the Lisbon ruling of the German *Bundesverfassungsgericht*, de Witte convincingly argues that the redistribution of welfare is premised on the individual's right to political self-determination, namely the possibility to translate through the democratic process normative preferences into social policy decisions. The absence of such democratic structures in the EU is related to the absence of a type of solidarity that is strong enough to sustain redistributive policies.

Yet, as de Witte rightly notes, since the outbreak of the Eurozone crisis, the EU has strongly engaged in redistribution practices through the introduction of new instruments of economic governance. By way of the excessive deficit procedure, the macro-economic imbalance procedure, the European Semester and its country-specific recommendations, the Commission gained significant influence in domestic budgetary structures and national welfare policies, typically pleading for a scaling back of expenditure and welfare benefits. Even though accurately describing these developments, the book does not exhaustively discuss this shift in the EU's role in welfare policy, which challenges many of the assumptions of European constitutional law.

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<sup>4</sup> A. Sangiovanni, 'Solidarity in the European Union' [2013] 33 OJLS 220.

More specifically, in order to legitimize the redistributive convergence programmes that the Members of the Eurozone have to undergo, the EU resorts to executive power and expertise as sources of legitimacy. This transfer of power from representative to executive institutions might normatively be undesirable, but could in practice legitimize redistributive practices or sustain commitments to solidarity in the EU. In this regard, it would be interesting for the reader to know, if at this point of integration history, the EU's orientation towards another type of legitimacy, based on executive power and expertise, could indeed be a valid way for the creation of bonds of solidarity between the Member States.

Notwithstanding the fundamental limitations to the EU's capacity to contribute to the attainment of social justice, de Witte reminds us that the EU clearly possesses certain social policy competences and, as highlighted in the Lisbon ruling, it must even be social. Against this background, de Witte illustrates the ways in which the EU is better positioned than the Member States to tackle the deficiencies of a purely national understanding of justice and to accommodate the increasingly transboundary nature of migration flows, economic interactions, and legal integration. First, EU law extends the capacity of individual citizens to pursue their conception of 'the good life' beyond their own Member State through the right to free movement. Second, EU law protects the principle of equal citizenship by extending a right to non-discrimination on the basis of nationality to all EU citizens, who exercise their right to free movement. Third, the EU is sensitive to the ways in which its demands of justice affect domestic redistributive processes. As de Witte notes, the parasitical nature of the EU's claims of justice, meaning that the EU cannot sustain redistributive practices on its own, makes the actual availability of welfare structures in the nation state crucial. This analysis of de Witte is very illustrative, since it dissolves the apparent contradiction between the Member States' prerogative in the awarding of welfare benefits on the one hand, and the development of Europe's social dimension on the other. In other words, de Witte convincingly approaches the EU not as a source of a genuine and new transnational concept of justice, but rather as a remedy for a spatially limited, national understanding of justice, which cannot mitigate the externalities ensuing from the increased interdependence and the mobility of persons, capital, and labour.

Having presented the interconnected nature of national and supranational social justice, the book formulates a theory of transnational solidarity, which serves to integrate the Union's claims of freedom and equality beyond the state with the relational structures of justice on the national level. The norms of transnational solidarity that structure this type of reintegration are deeply engrained in EU law and, in particular, in its norms of free movement and non-discrimination law. The core part of the book is devoted to the analysis of three types of transnational solidarity that describe how associative connections between citizens across borders, which may take economic, social or political forms, are translated into specific rights and entitlements.

The first type of transnational solidarity, presented in Chapter 3, is market solidarity, which serves to integrate the associative connections that emerge through economic interactions on the internal market within the domestic structures of the welfare state. Market solidarity suggests that economic interaction alone constitutes a motive for sharing resources between citizens. De Witte sees the incorporation of market solidarity into EU law, in the first place, in terms of extending the personal scope of welfare benefits to include non-national EU citizens that work in a host state. The book interestingly points out that the reason for the demand of equal treatment is not so much the specific financial contribution of the migrant to the host state's finances, but rather the migrant's general engagement with the economic life of the host state. The second way, in which market solidarity is displayed, is by the construction of rights and obligations that the collectivities of 'labour' and 'capital' owe each other when acting transnationally. In this case, the EU hesitantly sets rules, which allow host Member States to insulate their own conceptions of fairness against the dynamics of the internal market. Nevertheless, in matters of minimum wage, posted workers, and the right to collective action, de Witte rightly notes that the CJEU liberated capital from national constraints imposed to protect labour. Given that in cases such as *Laval*,<sup>5</sup> *Viking*,<sup>6</sup> *Rüffert*,<sup>7</sup> and *Commission v. Luxembourg*<sup>8</sup> the Court imposed transnational limits on the national exercise of labour rights, it is

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<sup>5</sup> Case C-341/05 *Laval*, ECLI:EU:C:2007:809.

<sup>6</sup> Case C-438/05 *Viking*, ECLI:EU:C:2007:772.

<sup>7</sup> Case C-346/06 *Rüffert*, ECLI:EU:C:2008:189.

<sup>8</sup> Case C-319/06 *Commission v Luxembourg*, ECLI:EU:C:2008:350.

questionable why de Witte chooses to include this dimension of EU law under the concept of transnational solidarity. If market solidarity aims to ensure that transnational economic interactions in the workplace conform to an idea of justice, it seems that this case law of the CJEU worryingly hollows and destabilizes the very function of transnational market solidarity. Instead of insulating the norms of market solidarity on the national level against the dynamics of the internal market, the CJEU introduces additional, transnational limits on the enjoyment of rights derived from market solidarity.

The book presents the area of healthcare as the third way in which market solidarity manifests itself in EU law. In this case, free movement law has been interpreted so as to allow patients to enforce the conditions of the healthcare contract that they have entered into in their Member State. In other words, whenever a state cannot provide a treatment, EU law grants patients the right to obtain it in another Member State with the retention of reimbursement schemes in the state of insurance. Even though this dimension of market solidarity seems at first glance to serve as a tool for patients to achieve transnational access to their healthcare rights, De Witte importantly clarifies that, according to empirical research, this exception to the principle of territoriality is used by Member States, such as Malta and Luxembourg, to make up for the lack of specialization or financial and technological resources to treat rare diseases. Although very revealing, the finding that Member States strategically use cross-border healthcare as a tool to meet their basic obligations for healthcare, seems to undermine the notion of transnational solidarity, since it serves foremost the interests of the incapable state rather than those of the patient in need of the most effective treatment.

Chapter 4 introduces the concept of communitarian solidarity as the second type of transnational solidarity that operates in the EU. Communitarian solidarity seeks to articulate the obligations of justice that follow from social interactions both on the European level and within the nation state, suggesting that co-presence of individuals alone constitutes a motive for sharing resources with fellow citizens. De Witte describes this type of solidarity as a procedural mechanism through which domestic citizenship is structurally opened up to include the associative social commitments that bind the migrant citizen to the host state polity. The illustratively presented



case law of the CJEU reveals that communitarian solidarity should not be understood as a substantive entitlement of mobile European citizens to all welfare benefits in the host state, but as a reflection of the social links between citizens. The exact nature, strength, and extent of such rights and entitlements depend primarily on the exact nature, strength, and extent of the migrant's social interactions in the host polity. In Chapter 4 the two outer edges of the obligation imposed on Member States under communitarian solidarity are discussed. The one extreme is formed by the recognition of a number of fundamental social rights, such as primary education, primary healthcare, and minimum subsistence benefits. Such rights, de Witte argues, can be accessed by every EU citizen, in whichever state the latter happens to reside. At the other extreme, the book discusses student benefits, which are linked to complex commitments that simultaneously reflect past, prospective, social, and economic commitments.

The description of communitarian solidarity as a spectrum with two outer edges is a very illustrative way to depict the different commitments of EU Member States to solidarity. Nevertheless, the inclusion of the right to minimum subsistence benefits under the social rights awarded to all EU citizens appears quite problematic. As de Witte notes as well, the question whether economically inactive migrants can claim minimum subsistence allowance in the host state is very contentious. In *Dano*,<sup>9</sup> where the CJEU had the chance to elaborate whether communitarian solidarity demands that Member States take care of all lawfully resident EU citizens in need, the Court argued that economically inactive EU citizens derive a right to equal treatment, only as long as they meet the conditions for residence in the host state, which include the need to have sufficient resources for themselves and family members not to become a burden on the welfare system of the host state. Since the right to social assistance benefits of EU citizens is very often balanced against the need to protect the general stability and availability of welfare resources, one might doubt whether its inclusion among the unconditional social rights enjoyed by EU citizens is convincing. Instead of describing communitarian solidarity as an obligation with two outer edges, it would probably be more precise to depict it as a continuum between unconditional enjoyment of rights and enjoyment of rights only after the

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<sup>9</sup> Case C-333/13 *Dano* ECLI:EU:C:2014:2358.



fulfilment of thick economic and social commitments. The different social rights falling under this category would then be positioned on this continuum, with the right to social assistance benefits falling in between the rights to primary healthcare and access to student benefits.

The third type of transnational solidarity within the EU presented in Chapter 5 is aspirational solidarity. It is the result of political interactions of EU citizens and imposes the negative obligation on Member States not to prevent their own nationals or migrant EU citizens from accessing the instruments that make up a 'good life', such as the labour market, public goods or welfare benefits. In this sense, aspirational solidarity suggests that being subject to EU law constitutes a motive for citizens to share resources. De Witte notes, however, that aspirational solidarity is the most divisive type of solidarity, as it has the potential to skew the redistributive preferences of Member States, to constrain many of the traditional instruments that Member States have used in order to manage their welfare models, and to pit the interests and aspirations of individual citizens against each other. Against this background, de Witte describes aspirational solidarity as a conditional and not absolute obligation, which is dependent on factual circumstances: when the aspirations of individual citizens risk undermining the redistributive commitments between all citizens, aspirational solidarity finds a limit.

De Witte describes employment market regulation as the first way in which EU law checks the coercive capacity of the state in limiting the individual's aspirations. According to the CJEU case law presented, the Court has interpreted the obligations of non-discrimination – in particular on the basis of age – as implying that Member States may only limit access to the labour market in order to protect associative commitments between citizens in that state. In other words, workers can only be forced off the labour market if the Member State can demonstrate that this contributes to the capacity of all citizens to live a 'good life'. Building on points raised in previous chapters, de Witte argues that aspirational solidarity also suggests that Member States may not limit the individual's aspirations by making access to welfare benefits conditional on continuous residence in the state. By presenting relevant case law, he convincingly explains that citizens may export welfare benefits and that Member States may only limit this right when allowing export would

destabilize internal redistributive commitments. The last instance of aspirational solidarity presented in this book concerns the obligation of host states to extend access to public goods, such as university and hospitals, to mobile EU citizens. Member States are in principle required to open up their universities or hospitals to migrant citizens, except if allowing access to migrants would undermine the associative commitments entered into by citizens in the host state.

In sum, the book analyses classic CJEU case law on issues of social policy under the innovative lens of transnational solidarity. Through this newly introduced concept, de Witte convincingly presents an original answer to the question whether the EU can contribute to the pursuit of justice and illustrates the various ways, in which EU law translates the associative commitments between citizens into norms of justice. More importantly, the book sketches the important role of both the Union legislator and the CJEU in the explicit and implicit articulation of the Union's commitment to justice. At the same time, an important contribution of the book is that it warns against the risk of EU law destabilizing rather than furthering the pursuit of justice in Europe. In this sense, de Witte sketches the different ways in which the EU institutions must be sensitive to the institutional and normative limits, which are inherent in EU law. In this way, the book admirably illuminates what it promised, namely, the added value of the EU law's focus on extricating the pursuit of justice from the nation state.